**Hoffman Fuel Company of Bridgeport *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plumbers and Steamfitters Local 173.** Case 34–CA–4700

October 26, 1992

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On July 8, 1991, Administrative Law Judge Elbert D. Gadsden issued the attached decision in this proceeding. The Respondent filed exceptions and a supporting brief. The General Counsel filed a reply brief. On December 26, 1991, the National Labor Relations Board issued an unpublished Order remanding the proceeding to the judge for further findings and reconsideration and explanation of his findings. On April 2, 1992, the judge issued the attached Supplemental Decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the attached decisions and the record in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the judge only to the extent consistent with this Supplemental Decision and Order, and to adopt the recommended Order in the Supplemental Decision as modified.

1. In November 1989, Supervisor Lucien Moran asked Mechanic Crew Leader David Condie what role he was going to play with the Union. Condie told Moran that he was going to take a very active role trying to unionize the Respondent. Moran replied, ''[W]e in management, we've got to do what we need to do about that.''

The judge found that Moran did not deny asking Condie about his future role with the Union, but that if Moran's testimony were construed as a denial, he would discredit Moran's denial and credit Condie. The judge concluded that Moran interrogated Condie in violation of Section 8(a)(1) of the Act.

As indicated in our remand Order, we disagree with the judge's finding that Moran did not deny the conversation. We therefore disavow the judge's reiteration of his finding. We nevertheless adopt the judge's finding that the Respondent coercively interrogated Condie, based on the judge's discrediting of Moran and crediting of Condie.

An employer's questioning open and active union supporters about their union sentiments, without threats or promises, does not necessarily violate Section 8(a)(1). *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Questioning coupled with veiled threats, however, does constitute unlawful interrogation even though the interrogated employee is an open and active union supporter. *Philips Industries*, 295 NLRB 717, 730–731 (1989); *J. Coty Messenger Service*, 272 NLRB 268 (1984).

Moran's questioning of Condie took place in the context of a hostile conversation concerning why Moran was giving everyone a hard time. Condie had not mentioned the Union prior to Moran's questioning, and Moran had no legitimate purpose for ascertaining Condie's prospective activities with the Union. Immediately following Condie's reply that he would be active in future campaigning, Moran stated that management would have ''to do what we need to do about that.'' Moran's implication was that Condie could expect to be harassed if he continued to engage in union activity. We conclude that Moran's questioning, coupled with the veiled threat conveyed in his reply to Condie's answer, had a reasonable tendency to restrain or coerce Condie in engaging in union activities and therefore constituted a coercive interrogation.

2. The judge found that the Respondent discharged Condie because of his union activities in violation of Section 8(a)(3) of the Act. Contrary to the judge, we find that the Respondent discharged Condie based on three job-related incidents and that the Respondent has sustained its *Wright Line*[2] burden of showing that it would have discharged Condie even in the absence of his union activities. We therefore reverse the judge and find no violation.

a. The incidents:

(i) In November 1989, Condie became angry at Moran for subtracting a half hour from his timecard and left a note on Moran's desk, telling him not to

[1] The Respondent has excepted to the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the credibility findings.

In the first sentence of sec. III,C in the judge's decision, ''Dave Condie'' should be ''James McCarthy.'' We correct this error.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening loss of work opportunity and layoff, we rely only on Supervisor Moran's statement to employees Vaugh and McCarthy that, in essence, the Company might not be able to retain them if the employees unionized. We find it unnecessary to rely on Supervisor Trotta's statement, which the judge mistakenly attributed to Moran.

Concerning the statement Moran made to Vaugh and McCarthy, the judge included employee James in this conversation. We note that although James overheard the threat made to Vaugh and McCarthy, he was not part of the conversation.

[2] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

''touch my fucking card again. Don't erase or even touch it again. This pisses me off.'' Trotta suspended Condie for 1 day.

(ii) In late January 1990, Condie was involved in a verbal dispute with dispatcher Tony Ramos. In a heated exchange about the whereabouts of a member of Condie's crew, Condie called Ramos an ''asshole.'' As a result, the Respondent placed a memo recounting the incident in Condie's file.

(iii) On January 5, 1990, Trotta held a meeting with several employees to discuss various matters, including the problem of employees being absent from the job without authorization. Trotta warned employees orally about the Respondent's plans to discipline employees who were caught off the job, and gave the employees a handout stating:

> We have five technicians who have been flagrantly off the job on numerous occasions. We have documented the violations which range from 15 minutes to an hour. All I can say to these individuals is the free ride is over. Disciplinary action will take place on any future violations.

On February 5, 1990, the Respondent dispatched Condie and apprentice James McCarthy on a service call to a residence about 12:55 p.m. They arrived at the residence at approximately 1:25 p.m. and, when they completed the job, Condie attempted unsuccessfully to radio the dispatcher. Condie and McCarthy then drove about 2 or 3 minutes to a telephone booth from which Condie called the dispatcher at about 2:30 p.m..

Lead Mechanic Lee Toraya and Supervisor Moran arrived at the residence at approximately 2:12 p.m., according to their watches. They did not find Condie or McCarthy on the job, so they waited until Condie called the dispatcher around 2:30 p.m. Toraya and Moran reported the incident to Service Manager Charles Trotta.

On February 7, 1990, Trotta met with McCarthy and Condie about the February 5 incident. Trotta asked Condie and McCarthy about what happened. Condie and McCarthy denied being absent without authorization.

Before deciding whether to discipline them, Trotta investigated the incident. Trotta went to the residence the day after the incident to become familiar with the location and he attempted to radio in from the site. Toraya and Moran both went back to the residence to interview the client as to when Condie and McCarthy departed. Trotta then recommended to General Manager Richard Horton that the Respondent discharge Condie.

On February 9, 1990, Horton fired Condie, based on Condie's absence from the jobsite without authorization on February 5, the timecard incident, and Condie's argument with Ramos. Condie and McCarthy were the only employees caught off the job without authorization subsequent to the Respondent's January 5 meeting with employees.

b. Discussion:

The judge, in concluding that Condie's discharge violated Section 8(a)(3), found that the reasons the Respondent advanced for the firing were pretextual. We find that the judge's discussion of the Respondent's reasons for discharging Condie was based on speculation unsupported by the record. We conclude that the Respondent showed that the decision to fire Condie was based on the timecard incident, the altercation with Ramos, and the Respondent's reasonable belief that Condie had violated its policy against unauthorized absences from the job. Although we accept arguendo the conclusion that the General Counsel established a prima facie case that union activities were a motivating factor in Condie's discharge, we find that the Respondent established that it would have discharged Condie even absent his union activities.

Regarding the absence without leave policy, the judge concluded that the Respondent had no such policy. The judge also concluded that the Respondent engaged in a ''diligent but unsuccessful effort to catch Condie off the job'' on February 5, 1990. Both conclusions are contrary to the record, the judge's findings of fact, and his credibility resolutions.

In fact, the Respondent established a clear, lawful disciplinary policy against such conduct on January 5, 1990. In a meeting with employees, including Condie, the Respondent warned that ''the free ride is over'' and that future violators caught off the job would be disciplined. The Respondent's disciplinary rule was unequivocal—i.e., violators would be disciplined.[3]

The credited facts concerning the events of February 5, 1990, are as follows. Moran and Toraya believed it was about 2:12 p.m. when they arrived at the jobsite where Condie and McCarthy were supposed to be working, the employees were not at the site, and Condie did not call the dispatcher until about 2:30. Thus, the Respondent reasonably believed that Condie and McCarthy had been absent from the jobsite with-

[3] We find no support in the record for the judge's implication that the January 5, 1990 handout was part of a plot designed to trap Condie. Indeed, the record shows that the Respondent's rule was consistent with its other efforts to make service technicians more accountable, e.g., the creation of the field supervisor position in October 1989.

We also disagree with the judge's finding that if there was a rule, it applied only to absences of 15 minutes or longer. That the Respondent illustrated the reason for the rule by mentioning documented instances of employees being caught off the job for periods of 15 minutes or longer cannot be construed as a statement that the rule applied only to employees absent for 15 minutes or longer. The record contains no suggestion that the Respondent stated that only absences of at least 15 minutes were punishable.

out authorization for at least 18 minutes in violation of the rule against absence without authorization.[4]

Further, we note that before deciding to discharge Condie, the Respondent conducted an investigation into the circumstances of the February 5, 1990 incident. The Respondent confronted Condie and McCarthy, visited the location at issue, and interviewed the client involved. Horton did not terminate Condie until after the investigation was completed and Trotta had recommended his discharge.

Contrary to the judge, we do not find that the Respondent's failure to discipline McCarthy shows that Condie's discipline was unlawful. McCarthy was an apprentice, junior to licensed technician Condie, and had a clean record. Because McCarthy and Condie were not similarly situated, we cannot conclude from the differing treatment of the two offenders that Condie's discharge was discriminatorily motivated. It is not within the province of the Board merely to substitute its judgment for that of the employer as to what constitutes appropriate and reasonable discipline. *J. Ray McDermott & Co.*, 233 NLRB 946, 952 (1977).

Thus, we do not believe the judge's finding that the Respondent utilized the February 5, 1990 incident as a pretext withstands scrutiny. We now turn briefly to the judge's findings regarding the two remaining reasons the Respondent advances for its discharge decision.

The record does not support the judge's finding that the Respondent's reliance on the timecard incident and the angry altercation with dispatcher Ramos was pretextual. Contrary to the judge's finding, the record contains no evidence that the suspension for the timecard incident was ''forgiven'' or expunged from Condie's record. Further, given the above findings, we cannot rely simply on a suspicion about the Respondent's repeated statements to Condie regarding his union activities to find any of the incidents leading to Condie's discharge to have been unlawfully motivated.[5]

In sum, we find no merit to the judge's conclusion that the Respondent discharged Condie after engaging in a ''diligent but unsuccessful effort to catch Condie off the job'' on February 5, 1990. We find that the Respondent has sustained its burden of showing that it would have discharged Condie absent his union activities. We shall therefore dismiss the 8(a)(3) allegation. See *Azalea Gardens Nursing Center*, 292 NLRB 683 (1989).

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge in the Supplemental Decision as modified below and orders that the Respondent, Hoffman Fuel Company of Bridgeport, Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(c) and 2(a) and 2(b) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

[4] This version of the facts is compelled by the fact that the judge did not discredit Moran and Toraya.

The judge speculated that the time in dispute was actually not as great as Moran and Toraya indicated because of the variations in the timepieces and the varying estimates of Condie and McCarthy as to their departure time. However, even assuming the Respondent was mistaken about the length of their absence, this would not establish that one of the reasons for the discharge was pretextual, because the credited evidence would still show that the Respondent reasonably believed that Condie had been off the job for an unauthorized period of time. See *American Thread Co.*, 270 NLRB 526, 532 (1984).

Further, the judge's speculation about the time discrepancy is inconsistent with his findings of fact and the record evidence. For example, not only are the following findings internally inconsistent, there is no logically discernible basis for finding any one of them supported by the record: there existed an 8-1/2 minute discrepancy between witnesses' accounts, a finding that fails to comport with any witness' version of the events; the ''reasonable amount of time involved in this dispute varies from 2:12 to 2:20 p.m. or 2:20 to 2:30 p.m., 7 to 17 minutes''; or there actually was a discrepancy of ''7 to 10 minutes.''

[5] During discussions with Condie about the timecard incident, the Ramos incident, and the absence without authorization incident, the Respondent assured him that its action had nothing to do with union activities.

Also, during another encounter between Condie and Ramos, Ramos accused Condie and employee Timmy Cole of being ''troublemakers.'' The judge inferred that Ramos was referring to Condie's and Cole's union activities. We note that there is no evidence that Cole was involved in any union activity and the context in which the reference was made does not support the judge's inference. See *Orba Transshipment of Alabama*, 266 NLRB 917, 932 (1983).

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate employees about their union activities and sympathies and the union activities and sympathies of fellow employees.

WE WILL NOT threaten employees with loss of work opportunity and layoff if the employees select the Union as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

HOFFMAN FUEL COMPANY OF BRIDGEPORT

*Michael Marcionese, Esq*., for the General Counsel.
*Edward F. O'Donnell, Jr., Esq*. and *Nicholas Grello, Esq. (Seiger, O'Connor, Schiff, Zangari & Kainen, P.C.)*, of Hartford, Connecticut, for the Respondent.
*Richard S. Aries, Esq. (Ashcraft and Gerel)*, of Hartford, Connecticut, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. A hearing in the above-captioned case was held before me in Hartford, Connecticut, on December 17 and 18, 1990. I issued my decision in the matter on July 8, 1991.

The Respondent filed exceptions and a supporting brief. The General Counsel filed a reply brief.

After delegating its authority in this proceeding to a three-member panel, who, after considering the decision and record in light of the exceptions and briefs, the Board remanded the proceeding to me for further specific credibility resolutions and findings as follows:

1. Credibility resolutions concerning an alleged conversation between Supervisor Lucian Moran and Mechanic Crew Leader David Condie.

2. Reconsideration of an alleged 8(a)(3) and (1) violation regarding the discharge of Condie, in light of the fact that I, in arriving at my conclusions and findings, relied on my 8(a)(1) finding that Respondent had no established policy of discipline in January 1990; that Respondent failed to discipline several employees for unauthorized absences from the job; that Respondent had not warned Condie in the past; and that Condie's unexcused absence from the job on February 5, 1990, was for only 10 minutes; and for several omissions and errors in the findings of fact and conclusions of law.

3. The critical testimony for which this case is remanded for credibility resolutions is a conversation alleged to have occurred between Supervisor Moran and Mechanic Crew Leader Condie in November 1989, at which time each worker was in his van parked side-by-side in the Company's yard as follows.

The 8(a)(1) Interrogation of Employee

In this setting, David Condie testified he asked Supervisor Moran why he (Moran) was giving everyone else a hard time because a number of service technicians were complaining to him (Condie) that he (Moran) was harassing them. Moran replied he was only doing what he had to do—a part of his job was to follow workers around and check on their presence. Moran asked him (Condie) what was his role going to be with the Union. Condie said he replied that he was going to be very active in support of the Union to see that the Respondent's employees were represented by the Union. Moran said, ''We in management we've got to do what we need to do about that.''

In crediting Condie's above testimony of his conversation with Supervisor Moran, I concluded that Moran did not unequivocally deny he ever had such a conversation with Condie.

In its exceptions to the above conclusion, Respondent contends Moran denied he asked Condie the above-described question and that Condie responded as above described.

However, the transcript in this regard shows that Moran testified in response to questions by counsel for the Respondent as follows (Tr. 338–341):

> Q. Now, let me direct your attention to November 1989, do you recall a conversation between yourself and Mr. Condie and you are both sitting in vans in the parking lot of Hoffman fuel?
>
> A. No, sir.
>
> Q. I want you to think carefully now, this is November 1989, Mr. Condie drives up next to your van and you have a conversation?
>
> A. No, sir.
>
> Q. Do you recall saying to Mr. Condie in November of 1989—let me ask you this. Do you recall him telling you that he had trouble communicating with people in November 1989?
>
> . . . .
>
> A. I do not understand the question, communicate?
>
> Q. Well, did Mr. Condie say to you in November of 1989, he couldn't communicate with the men?
>
> A. No.
>
> . . . .
>
> Q. *Do you recall* November 1989, saying to Mr. Condie, asking him what his role in the next union organizing drive would be?
>
> A. No, sir.
>
> Q. *Do you remember* him saying to you he'd be very active in the next union organizing drive?
>
> A. No, sir.
>
> Q. Now, would you turn your attention to the March 1990, do you recall a conversation that took place in the parts area between yourself, Mr. McCarthy, and Mr. Vaugh?
>
> A. Yes. We had a conversation.
>
> Q. Did you have any discussion at that time about the Union?
>
> A. No, I don't recall anything about the Union.
>
> Q. Do you recall Mr. Vaugh asking you about the Union and what it would mean to him as an apprentice?
>
> A. No, sir.
>
> Q. Do you recall Mr. Vaugh saying to you that—do you recall saying to him that if the Union came in, that apprentices would be relegated to cleaning and stuff?
>
> A. No, sir.
>
> Q. Do you recall telling him that if—Mr. Vaugh and Mr. McCarthy that if the Union came in, they could be laid off?
>
> A. No, sir.

As the above record shows, when Moran was asked did he have a conversation with Condie in November 1989 while each of them sat in their van, Moran said ''No.'' When asked did Condie, around the same date, tell him he could not communicate, or he had difficulty communicating with the men, Moran said, ''No.''

However, when Moran was specifically asked by Respondent's counsel did he *recall* asking Condie what role he was going to play in the next union organizing drive, Moran said, ''No.''

I do not equate ''not recalling an incident'' with ''denying that an incident occurred.'' In spite of the rather lengthy testimony of Dave Condie and Bob McCarthy, Supervisor Moran's testimony is brief. The record does not show that he categorically denied he asked the questions and made the responses Condie attributes to him about Condie's role in future union organizing activities.

In fact, it should be noted that Supervisor Moran's response to questions about a February or March 1990 conversation allegedly held with Joe Vaugh, Robert James, and Bob McCarthy, during which time he (Moran) told them unionization would probably mean the service technicians would be relegated to do only cleaning and vacuum work is not denied. Moran did not deny he made the statements but simply said, *he did not recall* making the statements attributed to him by Vaugh and McCarthy.

In any event, even if Moran had in fact denied he asked Condie was he going to talk to the Union—what was going to be his future role in union organizing, I would nevertheless discredit his denial because I was persuaded by his demeanor, the credited antiunion statements he made to Vaugh, James, and McCarthy, as well as all the credited testimony and circumstantial evidence of record, that his denial was not truthful. On the contrary, I was persuaded by the demeanor of Vaugh, James, and McCarthy that they were telling the truth and their accounts are consistent with the manifested antiunion behavior of Moran herein found, supra and infra.

After considering all the evidence I conclude and find: That in November 1989, Supervisor Moran asked mechanic crew leader Condie was he going to talk to the Union—what role was he going to play in the next union organizing drive; and that Condie told Moran he was going to be very active trying to unionize the Respondent. Moran replied, ''[W]e in management, we've got to do what we need to do about that.'' Thus, I find that such interrogation of Condie by Supervisor Moran about Condie's organizing role under the circumstances, without any assurances against reprisals from Moran, constituted coercive interrogation of employees, in violation of Section 8(a)(1) of the Act. *Southwire Co*., 282 NLRB 916, 917 (1987); *Atlantic Forest Products*, 282 NLRB 855, 856 (1987); *Fiber Glass Systems*, 298 NLRB 504 (1990).

## The 8(a)(3) Allegation

The complaint alleges that on February 9, 1990, Respondent terminated the employment of David Condie because he joined, supported, or assisted the Union, and engaged in concerted activities for purposes of collective bargaining or other mutual aid or protection, in violation of Section 8(a)(1) and (3) of the Act.

In its answer to the complaint, Respondent denied it terminated Condie for engaging in union activities. At the hearing, Respondent submitted evidence which it contends shows it discharged Condie for cause.

In compliance with the Board's remand Order, the evidence of Condie's termination and Respondent's defense of cause will be analyzed, evaluated, and explained pursuant to *Wright Line*, 251 NLRB 1083 (1980). In *Wright Line* the Board held ''that in such 8(a)(3) cases, where the Respondent offers evidence of cause for the discharge, the General Counsel must first make a prima facie showing sufficient to support the inference that protected concerted conduct was a motivating factor in the employer's decision and once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the employee's protected conduct.''

Thus, the first question raised under the *Wright Line* doctrine in the instant case, is whether the General Counsel has made a prima facie showing sufficient to support an inference that Condie's protected union activity was a motivating factor in Respondent's decision to discharge him on February 9, 1990.

### Evidence

The uncontroverted and credited evidence of record shows that Condie has been in Respondent's employ since 1984 and that he has attended every union meeting prior to the 1988 and 1989 union elections; that he was an active promoter of unionization among his fellow employees; that he was a part time observer for the Union in the April 7, 1989 union election, of which fact Respondent acknowledged it was aware; and that when the 1989 election resulted in a tie, it was Condie who told fellow employees they could try again (a third time) in a year (1990).

Additional evidence of Respondent's knowledge of Condie's union organizing activities is the credited testimony of Condie, that in November 1989 Supervisor Moran asked him if he was going to talk to the Union—what was his role going to be with the Union. Condie replied he was going to take a very active role in trying to obtain union representation for Respondent's employees. Moran said, ''We in management, we've got to do what we need to do about that.'' It is therefore clear from the evidence that Respondent knew from Condie's having served as an observer for the Union in the last election, as well as from Supervisor Moran's inquiry and Condie's response, that he (Condie) was a leading supporter of the Union and that he would be working to have the union election, possibly as early as April 1990 (1 year after the last election).

Also, the credited evidence shows that in early 1990 (not 1991), Supervisor Moran unlawfully threatened employees with loss of work by telling employees Bob McCarthy and Joe Vaugh, if the employees should go union, ''Respondent would probably not be able to do any service work—the service employees would be doing all cleaning and vacuum work (dirty and tiring work), and the chances would be good they would be laid off.'' Supervisor Moran did not offer McCarthy and Vaugh any assurances against such an eventuality, or any factual basis for his gloomy forecast of their future employment security, should the employees select the Union to represent them in the next election (spring of 1990).

Under the above circumstances, I find that Supervisor Moran's bleak prophesy of such an adverse affect on the employees' employment in the event of unionization of Respondent in 1990, without supplying any factual basis for it, constituted a threat of loss of employment for the employees. As such, I further find that Respondent's threatening conduct had a coercive and restraining effect on the exercise of the employees protected Section 7 rights, in violation of Section

8(a)(1) of the Act. *Creative Food Designs*, 282 NLRB 1266 (1987); *Cream of the Crop*, 300 NLRB 914 (1990).

### Condie's Encounters with Management

#### Note to Supervisor Moran

After working 15 or 16 hours on November 30, 1989, at 4 a.m., Condie noticed that supervisor Moran had changed his timecard, subtracting a half hour for lunch. Condie said he became angry about Moran's arbitrarily changing his timecard and he left the following note on Moran's desk (R. Exh. 1):

> Leu, don't touch my fucking card again. Don't erase or even touch it again. This pisses me off.''

Condie called Manager Trotta at 8:30 a.m. and apologized for writing the note to Supervisor Moran stating he was wrong and sorry but contended Moran should not have changed his timecard. Condie also apologized to Supervisor Moran whom he said he did not believe had the authority to change his timecard because he had never changed his timecard before.

The next day, December 1, 1989, Condie was in a meeting with Service Manager Trotta and Field Supervisor Moran. Condie testified Manager Trotta started the meeting by telling him it had nothing to do with his union activities; that he (Trotta) and Moran had come to bat for him because General Manager Horton wanted to fire him, but he (Trotta) thought he would suspend him for 1 day. Condie said he was subsequently paid for the day.

#### Condie's Altercations with Dispatcher Ramos

In early January 1990, Condie testified that, as crew leader, while looking over some service tickets, as he frequently did to check on errors or imperfections by apprentices, evening dispatcher Tony Ramos came into the office and grabbed the tickets from him. Ramos told him the tickets had nothing to do with him and called him an ''asshole,'' and that he (Condie) and Timmy Cole were *nothing but trouble makers* because they asked too many questions. Condie said he told Ramos he did not like to be yelled at because it caused him to get upset.

A couple of weeks later, Condie and a new service technician, Al Chrymerc, were called back to the office by the new dispatcher, Frank. Condie said he asked, ''What's going on?'' he wanted to know where was Bobby Slosser, who was on his crew. Dispatcher Ramos interrupted the conversation Condie had with Frank and said that was none of his concern ''mind your own business.'' Bobby Slosser said, ''It's okay.'' Condie asked, ''Please tell me where is he. I want to help him.'' Condie and Ramos engaged in some name calling when Ramos received other service calls and threw the tickets at Condie and Chrymerc. Ramos said Condie called him an ''asshole.''

Thereafter, Condie called Manager Trotta and told him, ''You know why I'm having so much trouble with Ramos,'' and requested a meeting with Trotta. During the meeting with Trotta and Moran in January 1990, Condie said Manager Trotta said, ''Look, all these difficulties you're having here have nothing at all to do with your union activities.'' Condie said he had not mentioned the Union. Although Condie may not have mentioned the Union to Manager Trotta, I find that by calling and telling Trotta ''you know why I am having so much trouble with dispatcher Ramos, Condie's statement implied the reason for the trouble was retaliation for his union activities. Consequently, when Trotta opened the meeting by telling Condie the subject of the meeting had nothing to do with his union activities, I find that Trotta was simply responding to Condie's telephone implication that he (Trotta) knew why he (Condie) was having so much trouble with Ramos.

During the meeting, Condie said he was told for the first time that he had to take orders from Ramos.

#### Respondent's Crackdown on Workers Being off the Job

At the same time David Condie was appointed crew leader in October or November 1989, mechanic Lucian Moran, in Respondent's employ since 1976, was promoted to lead mechanic to supervise and check on all service technicians and mechanics in the field. After Moran became supervisor, Service Manager Trotta testified that Moran had reported to him that five servicemen were caught off the job without having permission to be off the clock. Trotta said he did not talk to the five individuals; that he did not report them but instructed Supervisor Moran to make sure the men were on the job. None of the five individuals reported were disciplined.

Since Supervisor Moran continued to report men being off the job, Manager Trotta testified without dispute that he called a meeting of all the technicians and Supervisor Moran on January 5, 1990. During the meeting he informed the employees that Respondent had five employees who management knew were still not complying with the rules, and from this day forward, the free ride was over and disciplinary action would be taken. In support of his instructions to the servicemen, Trotta said a copy of the written substance of that meeting (January 5, 1990) was distributed to all employees in attendance. A copy of the cover letter thereof (R. Exh. 4) was attached to the paychecks of the employees, announcing the upcoming meeting which would include a discussion of work rules. David Condie acknowledged he recalled hearing Trotta telling the service employees that Respondent had five technicians or employees who were flagrantly off the job; that the individuals had been warned; and that disciplinary action will take place in the future.

Also, when David Condie was selected mechanic crew leader of a crew consisting of himself, technicians Al Chymeryc, and Bobby Slosser, Manager Trotta testified his selection as a crew leader was based on Condie's senior status, his knowledge of the work, and his responsibleness and reliability to assist members on his crew with any technical problems they encountered.

#### Jobsite Check

On Friday, February 5, 1990, Condie and apprentice McCarthy were dispatched on a service call at 12:55 p.m. to Westport on Newtown Turnpike, where he had previously been on January 30, 1990. At that residence, Condie said he tuned and oiled a burner. He and McCarthy arrived at the designated site about 1:25 p.m. on February 5, 1990. They testified they completed the job in about an hour or 1 hour

and 10 minutes, and left the premises about 2:30 or 2:35 p.m.

Condie further testified that before leaving the job, they called in on the radio from both of their vans (his and McCarthy's) and were unable to get through. They then drove around the corner to the top of the hill at the country store because they would then be on higher ground to call in. Condie sent McCarthy to get a couple of cups of coffee while he called in and informed the dispatcher that the job was completed and they were going on coffeebreak.

Condie testified that dispatcher Bill Castillac repeated their identification numbers 112 and 103, respectively, and said, ''coffee break.'' As he (Condie) was giving Bill the job report, he saw company van 101 (Toraya's van) go past their location, proceeding from the direction where they had just completed the service call. Castillac gave them the next service call and he and McCarthy completed their coffeebreak at 2:50 p.m., cleaned the brakes, and proceeded to the newly assigned service call.

Apprentice Robert McCarthy was employed by Respondent in December 1988. Essentially, he corroborated Condie's account of the subject service call, stating he and Condie were at the job at 2:14 p.m.; that they completed the job at 2:20 p.m. and went to their vans to call in, but could not make contact; that they drove around to the country store up on a hill, not quite a quarter of a mile, where they called in. However, McCarthy said after he left the job for that day, he went to the warehouse and looked at invoices, and noticed that 2:30 p.m. was written in. He handed both copies (G.C. Exh. 4) to Supervisor Moran and he never saw them again until 3 weeks ago. It is noted that the invoices, among other things, substantiate McCarthy's testimony as to the time he and Condie left the job and called in. After finishing their coffee he said they cleaned the brakes and proceeded to the next job assignment at 2:50 p.m. The Burner Service Record (G.C. Exh. 4) indicates Condie and McCarthy completed the Newtown Turnpike job at 2:30 p.m.

### Management's Account

Supervisor Moran testified that on February 5, 1990, Manager Trotta asked him and mechanic Lee Toraya to check on a heat exchanger job on Dearbrook Road in Westport. He and Toraya arrived at the jobsite at 1 p.m. After they completed the work he said he thought he would stop at the Newtown Turnpike job in Westport where Condie and McCarthy were assigned. Both Moran and Toraya testified they arrived at the Newtown Turnpike address at 2:12 p.m., according to Toraya's watch, but they did not see Condie and McCarthy, nor their vans. They drove up the driveway near the house, and down an incline where they could see around the side of the house. Since they did not see anyone, they drove to the bottom of the hill and waited for Condie to call in. At 2:30 p.m. Condie and McCarthy called the office. Moran said he and Toraya drove to a telephone booth on Wilson Road where he called Manager Trotta and informed him that he did not see Condie and McCarthy on the Newtown job. Trotta told him they would take up the matter when he (Moran) returned to the office.

Thereafter, Moran said he and Toraya waited a few minutes because, on their way to the telephone booth, they had seen Condie and McCarthy by the country store. When Condie and McCarthy drove by, he and Toraya went to another job in Westport where they found Timmy Cole on the job.

On February 6, Condie ran into, McCarthy who told him he was thrilled they had been on the Newtown Turnpike job because management was saying they were not at the jobsite. Condie said he got upset and called Trotta and asked him if he knew what was going on. Trotta told him, ''we'll talk about it in the morning'' (February 7). The next afternoon, February 7, Condie and McCarthy met with Trotta, Moran, and Lee Toraya. Trotta started telling Condie, whatever comes out of this has nothing to do with his union activities. When Condie was told he and McCarthy were not on the Newtown job, Condie said he called Toraya a liar because he and McCarthy were on the job at 2:14 p.m. Condie said McCarthy joined him in saying they were there but McCarthy said he did not say much because he did not have his records.

During the meeting, Condie also discussed his disagreement with management for calling McCarthy in and discussing the Newtown Turnpike service call in his absence, when he (Condie) was the mechanic on the job. Trotta said the matter had to be resolved by General Manager Horton. Condie called the office on Thursday to inquire whether any decision had been made on the matter. He was advised there would be a meeting in the morning (February 9).

When Condie entered the office on Friday, February 9, Horton told him ''because of the timecard incident with Moran, the incident with Tony Ramos, and this last incident, the Newtown Turnpike service call, he [Horton] was going to have to let him go.'' Condie asked ''was that it?'', and Horton said, ''Yes, that's it.''

### Conclusions

Although Condie said he and McCarthy arrived at the Newtown Turnpike job at 1:25 p.m. and McCarthy said they arrived at 1:20 p.m., I do not find that the 5 minutes difference in their time accounts of arrival raises any significant credibility question. It is the time they completed and depart the job that is in issue here. Condie and McCarthy said they completed the job and left the premises at 2:30 p.m. However, on further examination McCarthy testified that they completed the job at 2:20 p.m. and went to their trucks to call in. Since they could not make contact with the office they drove their vans less than a quarter of a mile around to the country store on the top of a hill.

Condie, as well as Supervisor Moran and mechanic Toraya testified that Condie called in at 2:30 p.m. Since Condie and McCarthy testified they tried to call the office from the driveway of the customer without stating how many minutes they tried calling in from both vans, it is only reasonable to conclude that their efforts consumed a few minutes. Certainly a few additional minutes elapsed as they drove a little less than a quarter mile to the country store. These considerations support McCarthy's account that he and Condie finished the job at 2:20 p.m., and after trying to call in, drove to the country store where Moran and Toraya saw them.

The testimonial accounts of Condie and McCarthy conflicts with the accounts of Supervisor Moran and mechanic Lee Toraya, in that Moran and Toraya testified they arrived at the Newtown Turnpike jobsite driveway at 2:12 p.m., according to Toraya's watch. No evidence was introduced to prove that the timepieces of Condie, McCarthy, or Toraya

were correct, incorrect, or synchronized. Under these circumstances it is clear that a reasonable amount of time involved in this dispute varies from 2:12 to 2:20 p.m. or 2:20 to 2:30 p.m., 7–17 minutes. Allowing for such evidentiary exigencies as variation in the time of the respective timepieces, probable honest estimates of the times by the different workmen, and credibility of all four witnesses, I find that it may be reasonably inferred from the circumstances that the time in dispute was about 8-1/2 minutes.

Evaluating the credibility of Moran and Toraya as opposed to Condie and McCarthy in this regard, I am constrained to consider the demeanor of each witness, all the evidence of record, particularly the history of Condie's persistent efforts to unionize the Respondent, his pledge to try again to organize the Company in about April 1990, of which fact Supervisor Moran was fully apprised by Condie, Supervisor Moran's hereinbefore found unlawful interrogation and unlawful threatening conduct (constituting union animus), and the entrance of the new year (1990) approaching February and March, the organizing months prior to an election 1 year subsequent to the last one, and the likelihood of Condie working diligently to organize his fellow employees, as he promised Supervisor Moran he would do, I am persuaded by all of these factors, including Moran making an issue of approximately 8-1/2 minutes, if any, when Respondent's January 1990 expressed concern with workers being off the job was for a duration of 15 minutes to 1 hour. Based on all of these factors, I credit the testimony of Condie and McCarthy over that of Moran and Toraya.

Under the above circumstances, it is patently obvious, and I conclude and find that, the General Counsel has established a prima facie showing that Respondent's decision to terminate Condie's employment on February 9, 1990, was motivated by Condie's union activities, of which Respondent was well aware.

The General Counsel having made such a showing, the burden under *Wright Line*, now shifts to the Respondent to demonstrate that the February 9, 1990 discharge of David Condie would have occurred even absent Condie's union activity.

### Respondent's Defense

Respondent contends it did not see either Condie or McCarthy, or their vans at the jobsite. Of course they did not see Condie and McCarthy because they did not arrive at the Newtown Turnpike residence before Condie and McCarthy departed between 2:20 and 2:25 p.m. After all, it is not shown that Moran and Toraya had any way of knowing exactly what time Condie and McCarthy were going to arrive at the subject residence, or precisely what time they were going to complete the job. Nonetheless, even if Condie and McCarthy had in fact left the jobsite 7 to 10 minutes earlier than they should have, that amount of time is still less than the 15 minutes to 1 hour absence from the jobsite with which Respondent had expressed concern on January 5.

Under the circumstances here, it appears obvious that Supervisor Moran (Respondent) was trying to make a case of cause to get rid of Condie before he embarked on his organizing activities, as he had assured Moran he would do.

Finally, after evaluating all the foregoing credited evidence of Supervisor Moran's unlawful interrogation of Condie, Moran having unlawfully threatened employees James Vaugh and McCarthy with loss of work, and Moran's diligent but unsuccessful effort to catch Condie off the job, knowing that Condie was the principal leader of a third effort to unionize Respondent employees, in an effort to justify discharging him, I find that Respondent's asserted reasons for discharging Condie (his note to Moran about the timecard change, Condie's altercations with dispatcher Tony Ramos on two or more occasions, and Condie's asserted absence from the job on February 5) are pretextual; and that the General Counsel has made a prima facie showing to support an inference that Condie's protected union activity was the motivating factor for Respondent's decision to discharge him on February 9, 1990. *Wright Line*, supra.

The General Counsel having discharged the required prima facie showing, the burden under *Wright Line* now shifts to Respondent to demonstrate that the February 9 discharge of David Condie would have occurred even absent any union activity by him.

The only new reason Respondent appears to advance for Condie's discharge, and about which it did not inform him at the time of his discharge, resulted from questions by counsel for Respondent regarding outside service or plumbing work performed by Condie. In this regard Respondent presented a company form dated September 30, 1988 (R. Exh. 2) which shows that Former Service Manager John Morrissey held a discussion with Condie about the latter driving a service van which belonged to his father-in-law. It further shows Condie was told in no uncertain terms ''If he is working for Hoffman Fuel he cannot do burner service work for any other company''—and ''He clearly understands this is his only warning.'' The form also indicated Condie received a copy.

However, Condie testified that Former Service Manager John Morrissey as well as Manager Charles Trotta told him, ''If there's any plumbing work or circulators to be replaced, he [Condie] could do it on his own time; and that he [Condie] could perform work on his own, as long as there is no service contract and he is not competing with the company.'' Condie said Manager Trotta knew he (Condie) did chimney sweeping and Respondent (Trotta) also told him ''If we have any problem chimney and it's not real busy, we'll refer it over to you, as well as oil burners.'' Condie said no management representative of Respondent ever told him he could not do the above-described outside work.

John Morrissey did not appear and testify in this proceeding and I do not find that Manager Trotta ever refuted Condie's testimony or established evidence that he violated the warning by performing *burner service* work. A warning simply means that the worker to whom it is issued must not engage in, or repeat certain specified conduct. The warning does not serve as a basis for disciplinary action unless the prohibited conduct occurs or is repeated by the worker after the warning was issued. Here, Respondent failed to produce any evidence that Condie performed outside burner service work either before or after the warning issued 1 year and 4 months earlier. Such failure clearly demonstrates the pretextual nature of this warning as a defense to Respondent's current discharge of Condie.

With respect to Condie's note to Supervisor Moran about the timecard change, I find that this incident occurred late in Condie's employment tenure (November 30, 1989); and that Condie apologized to Supervisor Moran and Manager Trotta

for writing the note. Although Condie was suspended for a day, it is uncontroverted that he was paid for the day. This appears to be a childlike agreement of ''Let by-gones be by-gones.''

The altercation which occurred between dispatcher Tony Ramos and Condie in January 1990 appears to have precipitated over a trivial matter of Condie looking over the service tickets as he frequently did. Ramos told Condie it was none of his business. Although both parties appeared to have exchanged vulgar appellations referable one to the other, the evidence does not establish anything more substantive to the altercation. Significantly, however, is the uncontroverted statement of Ramos telling Condie, he (Condie) and Timmy Cole were ''*nothing but trouble makers*.'' I find that it may be reasonably inferred from the persistent active union advocacy of Condie, that in the context of the circumstances of the company at that time, the term ''troublemakers'' to Condie and Cole was animus in referring to union organizers (Condie and Cole).

About 2 weeks later, a second altercation between Condie and Ramos occurred, when Condie's crewmember Bobby Slosser was not present, and Condie asked the new dispatcher, Frank, where was Slosser. Ramos interrupted and told Condie to mind his own business. Again, Condie and Ramos engaged in name calling. This time Ramos accused Condie of calling him an ''asshole.'' During a subsequent meeting with Manager Trotta, Condie was directed to take orders from dispatcher Ramos. Beyond this, there does not appear to have been anything more substantive to the altercation. I credit Condie's testimony that the Union was mentioned by Manager Trotta during the meeting, and I find that mention of the Union by management (Trotta) evidences the Respondent's (Manager Trotta) consciousness of unionism associated with the presence of Condie.

### Respondent's Contended Warning Policy

With respect to my finding that Respondent had no established policy of discipline in January 1990, the record shows:

During the company-called meeting on January 5, 1990, Manager Trotta testified he spoke to the servicemen about their excellent performance during the cold weather months and the matter of work rules. He distributed a copy of the 11 items (R. Exh. 4) he spoke about to all servicemen in attendance. As appears pertinent herein, item 3 provides as follows:

> We have five technicians who have been flagrantly off the job on numerous occasions. We have documented the violations which range from 15 minutes to an hour. All I can say to these individuals is the free ride is over. Disciplinary action will take place on any future violations.

David Condie acknowledged knowing about this rule (item 3). The evidence does not show that Respondent had any meetings with Condie or had issued him any disciplinary warnings about being off the job. Condie had received a previous warning about performing burner service work but no special warning about being off the job.

Item 3 above appears to be the only semblance of a rule by Respondent, concerning service technicians being off the job without permission. However, even here, it is noted that the rule simply stated ''Disciplinary action will take place on any future violations.'' Disciplinary action ordinarily may involve a verbal or written warning, docking a portion of an employee's pay check, suspension for several hours or days, and sometimes ultimate discharge. Here, item 3 does not define disciplinary action. Under these circumstances, I find that item 3 is no more than a limited general written warning to the technicians, which was also expressed verbally to them during the January 5 meeting. To the extent that item 3 may serve as a disciplinary policy, it does not describe any specific, or any degrees of disciplinary action.

Prior to January 5, 1990, Respondent's practice or unwritten policy, according to Supervisor Moran, was simply to talk to the technician involved. Prior to the discharge of Condie Respondent had not discharged any technician for being off the job. Respondent merely talked to the particular employee caught off the job. The record does not show that Moran or any other representative of management ever talked to Condie about being off the job. Notwithstanding, the record does show that the first and only technician to be disciplined for assertedly being off the job is David Condie. Moreover the discipline imposed on him was the severest form of discipline, discharge, in the absence of any prior warning for being off the job. It is obvious that David Condie was singled out for a diligent effort by Supervisor Moran to catch him off the job. When Moran thought he had caught Condie off the job, the discipline was swift and severe: discharge, without having issued any prior warning to him for the alleged infraction. Under these circumstances, I find that the discriminatory discharge of Condie was for his persistent union activities, in violation of the Act.

Notwithstanding all of Respondent's above-asserted defenses, I do not find either, or any combination of them, a sufficient demonstration that Condie's discharge on February 9 would have occurred even absent his union activities. This is particularly true when it is noted that all of Respondent's asserted defenses for Condie's discharge occurred within the last 3 months of his 6 years' employment with Respondent, and just at the dawn of a third union organizing effort, of which Respondent was apprised Condie would be very much involved.

In view of the foregoing evidence and findings, I further find that Respondent's reasons for deciding to discharge David Condie on February 9 was for his persistent union organizing efforts, and that his discharge was therefore discriminatory and in violation of Section 8(a)(1) and (3) of the Act.

### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct, I will recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has restrained and coerced its employees in the exercise of their Section 7 rights, by interrogating them about their union activities and sympathies, and the union activities and sympathies of fellow employees, in violation of Section 8(a)(1) of the Act; that it threatened employees with loss of work opportunity and layoff if they selected the union as their collective-bargaining representative, in violation of Section 8(a)(1); and that it discriminated

against an employee by terminating his employment because he advocated and supported the Union, in violation of Section 8(a)(1) and (3) of the Act. The recommended Order will provide that Respondent cease and desist from engaging in such unlawful conduct; that it take certain affirmative action necessary to effectuate the policies of the Act; and that it make David Condie whole for any loss of earnings he may have suffered within the meaning and in accord with the Board's decision in *F. W. Woolworth Co*., 90 NLRB 289 (1950); *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[1] except as specifically modified by the wording of such recommended Order.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondent cease and desist from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. *NLRB v. Entwistle Mfg. Co*., 120 F.2d 532, 536 (4th Cir. 1941).

## CONCLUSIONS OF LAW

1. Hoffman Fuel Co. of Bridgeport, the Respondent, is and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Association of Journeymen and Apprentices of the Pluming and Pipefitting Industry of the United States and Canada, Plumbers and Steamfitters Local 173, the Union, is and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees about their union activity and sympathies and the union activity and sympathies of fellow employees, Respondent has violated Section 8(a)(1) of the Act.

4. By threatening employees with loss of work opportunity and layoff, if the employees elected the Union as their collective-bargaining representative, Respondent has violated Section 8(a)(1) of the Act.

5. By discriminatorily terminating the employment of employee David Condie because he advocated and supported union representation of Respondent's employees in the past, and would do so again, Respondent has violated Section 8(a)(1) and (3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

## ORDER

The Respondent, Hoffman Fuel Company of Bridgeport, Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities and sympathies and the union activity and sympathies of fellow employees.

(b) Threatening employees with loss of work opportunity and layoff if they select the Union as their collective-bargaining representative.

(c) Discharging employees because they advocate and support union representation of the employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to David Condie immediate and full reinstatement to his former position or, if such position no longer exist, to a substantially equivalent position without prejudice to his seniority or other rights previously enjoyed, and make him whole for any loss of pay suffered by reason of the discrimination against him, with interest, in the manner described in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records, and reports, and all records necessary to analyze the amount of backpay under the terms of this recommended Order.

(c) Post at Respondent's plant and place of business located in Bridgeport, Connecticut, the attached notice marked ''Appendix.''[4] Copies of said notice, on forms provided by the Regional Director for Region 34, after being duly signed by Respondent's authorized representative, shall be posted immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order, what steps Respondent has taken to comply.

[1] See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''